IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1550

WILLIAM J. VORBECK, et al.,
Appellants,

vs.

THEODORE D. McNEAL, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri

MOTION TO AFFIRM AND BRIEF IN SUPPORT THEREOF

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MOTION TO AFFIRM

Come now the appellees, the members of the Board of Police Commissioners of the City of St. Louis, and move the Court to affirm the judgment below on the grounds that:

1. The basic issue whether the appellant police officers have a constitutional right to require the State of Missouri, through the Board of Police Commissioners of the City of St. Louis, to

bargain collectively with representatives of said police officers concerning wages, hours and working conditions, is a matter of settled law in that it has consistently been answered negatively by both the federal courts and the Supreme Court of the State of Missouri.

2. The decision to grant to or withhold from public employees the right to bargain collectively is within those matters reserved to the states by reason of the Tenth Amendment to the United States Constitution and it is proper, through the exercise of the State of Missouri's police power, to decline to negotiate and contract with policemen with regard to wages, hours, and working conditions.

3. The central and primary purpose of the State of Missouri's exercise of its police power is the duty to safeguard the welfare of its citizens and their property and, therefore, any decision not to give mandatory collective bargaining privileges to police officers relates to the achievement of the legitimate state purpose of preserving public welfare and establishing an efficient police department to exercise that responsibility.

4. The Court below recognized the difference between freedom of association and the right to collectively bargain. In recognizing this, the Court held that the appellant police officers can form and join a labor organization. Thus, the only federal question of any substance presented below was resolved in favor of the appellants.

5. The questions presented are not so substantial as to require the plenary consideration of this Court, with briefs on the merits and oral arguments for resolution, as to any claim of a denial of equal protection in that the appellants are not an identifiable suspect class and no fundamental right is at issue. Absent these crucial elements, the three-judge panel properly applied the rational basis test and properly held that it cannot

be said that no rational basis could exist between the exclusion of police officers from the collective bargaining procedures of Section 105.520 R.S.Mo. 1969 and the legitimate state purpose of an effective police force.

WHEREFORE, the appellees submit that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and pray that this Court enter an order affirming the judgment of the Court below.

Respectfully submitted

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BRIEF IN SUPPORT OF MOTION TO AFFIRM

ARGUMENT

I

Appellants Have No Constitutionally Secured Right to Collectively Bargain With Appellees.

There is no constitutional right to force an employer to bargain collectively with an employee or a group of employees.

Many courts including the court below have so held. *Atkins v. City of Charlotte*, 296 F.Supp. 1068, 1077 (three judge court) (W.D. N.C. 1969); *Melton v. City of Atlanta, Georgia*, 324 F.Supp. 315, 320 (three judge court) (N.D. Ga. 1971); *Confederation of Police v. City of Chicago*, 382 F.Supp. 624, 628 (N.D. Ill. 1974); *Winston-Salem/Forsyth County Unit of the North Carolina Association of Educators v. Phillips*, 381 F. Supp. 644, 646 (three judge court) (M.D. N.C. 1974); *University of New Hampshire Chapter of the American Association of University Professors v. Haselton*, 397 F.Supp. 107, 109 (three judge court) (D. N.H. 1975); *Newport News Fire Fighters Association Local 794, International Association of Fire Fighters v. City of Newport News, Virginia*, 339 F.Supp. 13, 17 (E.D. Va. 1972); *Hanover Township Federation of Teachers Local 1954 (AFL-CIO) v. Hanover Community School Corporation*, 457 F.2d 456, 461 (7th Cir. 1972); *Lontine v. VanCleave*, 483 F.2d 966, 968 (10th Cir. 1973).

No court has held otherwise.

II

Under the Powers Reserved by the Tenth Amendment, the State of Missouri Has Properly Excluded Police Officers From Those Public Employees Entitled to Compel Their Employers to Meet, Confer and Discuss Wages, Hours and Working Conditions With Representatives of Such Employees.

The appeal by the appellants for mandatory bargaining procedures to negotiate the conditions of their employment must be an appeal to the Missouri Legislature, not to the federal courts. From all of the case law and statutory provisions relied upon by all parties, it is indeed manifest that the central question on which the decision depends is so unsubstantial regarding the constitutional rights of appellants as not to need

further argument in the courts. Thus, the judgment as to bargaining procedures available to police officers must be affirmed.

Missouri, as other jurisdictions, adheres to the fundamental proposition that legislative discretion cannot be delegated away. No citizen or group of citizens has the right to contract for legislation or to prevent legislation. *City of Springfield v. Clouse*, 206 S.W.2d 539, 543 (Mo. en banc 1947); *King v. Priest*, 206 S.W.2d 547, 556 (Mo. en banc 1947). For this very reason, the Missouri Supreme Court unanimously held in *City of Springfield v. Clouse, supra*, at 543, that Article I, Section 29 of the Missouri Constitution is a declaration of approval by the State of Missouri of the policy set forth in the National Labor Relations Act but that that constitutional provision does not give public employees the right to collectively bargain.

The decision, by the citizens of the State of Missouri through their legislators, to withhold from the police collective bargaining procedures set forth in Sections 105.510 and 105.520, R.S.Mo. 1969, as amended, is within the powers reserved to the State through the Tenth Amendment. The State may properly refuse to bargain with its employees and declare it by statute. *Atkins v. City of Charlotte, supra*, 1077. In *Winston-Salem/Forsyth County Unit of the North Carolina Association of Educators v. Phillips*, the court articulated this point at 381 F.Supp. 648, fn. 4:

> "The Tenth Amendment of the United States Constitution reserves to the states those powers not delegated to the federal government. The Amendment is a clear expression of the desire that the states would retain their sovereignty within our federal form of government. The decision by the State of North Carolina to void contracts between public employee organizations and governmental units is a matter entrusted to the state's sovereign discretion. See *Atkins, supra*, as quoted above. It cannot be

emphasized enough that in speaking of a state's sovereignty, the term means more than prerogatives belonging to some inanimate object, rather it signifies the right of the people of a state to govern themselves under the form of government of their choosing. Therefore, since the prospect of public employee collective bargaining impinges upon those rights, it truly is important that the legislature, elected by the people, determine whether to permit such collective bargaining, and if so, on what terms."

III

An Effective, Efficient and Disciplined Police Force Is a Legitimate State Purpose and It Cannot Be Said That the Exclusion of Police Officers From the Statutory Right to Collectively Bargain, as Provided in Section 105.520, R.S. Mo. 1969, Does Not Rationally Relate to the Achievement of That Goal.

With respect to appellant's equal protection argument, policemen certainly are not a traditionally suspect group targeted for discrimination. Indeed, no such argument has ever been advanced by the appellants at any stage of this action. The fundamental right to associate was carefully and properly treated separately and apart by the Court from its analysis of the policemen's right to collectively bargain. The distinction between freedom of association and collective bargaining is the difference between meeting with whom one wants and the duty to participate in such a meeting. While First Amendment rights cannot be withheld, this Court has recognized that it does not possess "either the ability or authority to guarantee to the citizenry the most *effective* speech . . ." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 36 (1973).

Mandatory collective bargaining is not constitutionally fundamental but a legislative perogative. Thus, for equal protection purposes, a "statutory discrimination will not be set aside if any

state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). It is indeed clear that the rational basis standard was properly applied to the appellants' equal protection argument before the three judge panel.

"And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Dandridge v. Williams*, 397 U.S. 471, 485-486 (1970).

The burden is not upon appellees to establish that a rational basis exists between the denial of collective bargaining rights to police officers and a disciplined police force, as appellants suggest on page 9 of their jurisdictional statement. *Morey v. Doud*, 354 U.S. 457, 464 (1957). The dispositive fact is that appellants failed to demonstrate that there is no rational connection between the exclusion of policemen from the limited collective bargaining procedures granted to other public employees and the promotion of the safety of persons and property. *Kelley v. Johnson*, 44 L.W. 4469, 4472 (No. 74-1269, decided April 5, 1976).

The First Amendment claims of the appellants are not seriously pressed by them on this appeal. Indeed, both "Questions Presented" urge this Court's consideration of appellants' equal protection claims. Although no First Amendment right is directly involved, it should be noted that this Court has stated in *Kelley v. Johnson*, 44 L.W. at 4471:

> "More recently, we have sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment. *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). If such state regulations may survive challenges based on

the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment."

The discipline and government of the police force has been recognized as essential to the public peace by the State of Missouri. *King v. Priest*, 206 S.W.2d 547, 554 (Mo. en banc 1947). The efficiency of public employees is a legitimate and substantial governmental interest. *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 565 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 616-617 (1973). The people of Missouri obviously have voiced their desire not to allow policemen to negotiate their working conditions through the collective bargaining procedures. Just as this Court found hair regulations to relate rationally to the mode of organization of a police force in *Kelley v. Johnson, supra*, so too does the decision of the people of Missouri to withhold the right to collectively bargain from policemen relate to the discipline necessary to the efficient operation of a police department.

The people of Missouri, through their legislative representatives, have "chosen a mode of organization which it undoubtedly deems the most efficient in enabling its police to carry out the duties assigned to them under state and local law. Such a choice necessarily gives weight to the overall need for discipline, *esprit de corps*, and uniformity." *Kelley v. Johnson*, 44 L.W. at 4472; *Quinn v. Muscare*, 44 L.W. 4627, 4628 (No. 75-130, decided, May 3, 1976).

The nature of a police organization requires members of different rank and the unquestioned execution of commands. The promotion of the safety of persons and property are indeed at the core of the State's police power. The organization of the police department and the conditions of its membership in order

to promote and maintain the safety of the citizenry for whom it was organized to serve has been voiced and enacted by the State of Missouri. The statutes challenged do no violence to any right granted to appellants by the First and Fourteenth Amendment. The appellants are simply in error in their position that collective bargaining is a constitutional right and that their exclusion from the bargaining procedure is a denial of equal protection.

If appellants' economic need requires the use of the bargaining procedures at issue here, they must persuade the people of the State of Missouri, through its legislative process, not this Court or these appellees.

The questions raised in this appeal involve issues of State legislation and the internal affairs of the State of Missouri. No confusion exists in the federal courts as to the distinction between the freedom of association and the right to collectively bargain. The appellants are free to exercise the former. However, they have failed to persuade the people of Missouri that the grant of the right to collectively bargain with the State will not detract from the efficient police department established for the protection of the people of Missouri.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to not need further judicial consideration and, therefore, the Court should affirm the judgment below without further briefs or argument.

Respectfully submitted

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